

N6FDBANO

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

22 Cr. 673 (LAK)

5 SAMUEL BANKMAN-FRIED,

6 Defendant.

Conference

7
8 New York, N.Y.
June 15, 2023
9 10:30 a.m.

10 Before:

11 HON. LEWIS A. KAPLAN,

12 District Judge

13 APPEARANCES

14 DAMIAN WILLIAMS

15 United States Attorney for the
Southern District of New York

16 BY: NICOLAS ROOS, ESQ.

DANIELLE R. SASSOON, ESQ.

17 DANIELLE M. KUDLA, ESQ.

SAMUEL RAYMOND, ESQ.

18 NATHAN M. REHN, ESQ.

JIL SIMON, ESQ.

19 Assistant United States Attorneys

20 COHEN & GRESSER, LLP

Attorneys for Defendant

21 BY: MARK S. COHEN, ESQ.

CHRISTIAN R. EVERDELL, ESQ.

22 SRI KUEHNLENZ, ESQ.

23 STEPHEN G. DICK, ESQ.

N6FDBANO

(Case called; appearances noted)

THE COURT: Good morning.

Where I would like to begin this morning is with the government's letter of last night in the wee hours or the closing hours of Flag Day, and I have some questions about it. If I were to agree with the government's position that the defendant has no standing to raise any rule of specialty issue that there may be, why would the government want or need a waiver from the Bahamas?

MR. REHN: Yes, your Honor. From the perspective of the defendant's right to object, we agree with the Court, and it's well-established in the Second Circuit that the defendant does not have a right to object. The government, however, has its own diplomatic obligations that it complies with, and one of those includes an obligation to the Bahamas to comply with the terms of the extradition treaty. And in accordance with those obligations, we have been seeking a waiver of the rule of specialty. The government would not proceed on those counts absent that waiver, and so as the defense suggested in their reply brief, as an alternative, severing those counts, and going forward with the counts as to which extradition was originally granted seems to be appropriate given the developments this week in the Bahamas.

THE COURT: But the government would not proceed on the basis of a policy decision, which is essentially one -- a

N6FDBANO

1 mixed decision of law and foreign policy, hmm?

2 MR. REHN: That's correct, your Honor. The government
3 has an interest in observing diplomatic relationships for a
4 number of reasons, and it's the government's view that it would
5 not proceed on counts added post extradition if the extraditing
6 country has not consented to that.

7 THE COURT: And that would be true, wouldn't it, in
8 the event that the Bahamas takes no position?

9 MR. REHN: With respect to the new counts, that's
10 correct, your Honor. With respect to the one count as to which
11 the extradition record arguably contains some ambiguity, it's
12 the government's view that it intends to proceed. The United
13 States has notified the Bahamas of that interpretation of the
14 extradition record, and asked the Bahamas to timely object if
15 it views the facts differently, and it has not received any
16 objection.

17 THE COURT: Is there any reason I have to make the
18 determination now?

19 MR. REHN: The determination as to --

20 THE COURT: As to severance. If I were to agree for
21 the sake of argument with the defendant's position, as to the
22 legal sufficiency of any of the newly added counts, you would
23 not have any issue of specialty problem, if you have one now,
24 with respect to that count or counts.

25 MR. REHN: Your Honor, if the Court were not to sever

N6FDBANO

1 the counts, I think the issue that would be created would be
2 that there would be -- the parties would be under some
3 uncertainty as to whether those counts would be included in the
4 trial or not, which would affect the parties' trial
5 preparation.

6 When the government initially sought the superseding
7 indictment, it had already had some communications with the
8 Bahamas, and it continued to have those communications after
9 seeking the superseding indictment and was under the view that
10 the executive authorities in the Bahamas would be able to
11 respond to that waiver request well in advance of trial.
12 Because of the development in the Bahamian court this week,
13 it's our view we can't realistically estimate the timeframe for
14 that, and so the more prudent course would be to acknowledge
15 now, so the parties can focus on original counts in the
16 indictment that we will not be proceeding to those counts in
17 October.

18 THE COURT: Could you be ready to try the case in
19 October, even if I don't sever?

20 MR. REHN: We have always been of the view that we
21 would be ready to try the case in October, provided that the
22 Bahamas grant a waiver in advance of that date, yes.

23 THE COURT: What impact would a severance have on
24 trial duration?

25 MR. REHN: Your Honor, I believe that it would shorten

N6FDBANO

1 the trial, although not significantly. We would estimate that
2 the trial without these counts would take four to five weeks, I
3 think we've previously indicated, and we think a trial
4 including these counts would take five to six weeks, maybe
5 slightly more than that. So it might take one to two weeks off
6 the trial time.

7 THE COURT: Thank you, Mr. Rehn.

8 Mr. Cohen, anything that you'd like to add to this
9 discussion?

10 MR. COHEN: Yes, your Honor, if I might, a couple of
11 points on the discussion the Court has been having.

12 In light of the government's letter last night, we
13 agree with your Honor that things have changed. So, as we
14 argued in our papers to your Honor, we still believe that the
15 -- I'll call them the new charges that Mr. Rehn referred to,
16 should be dismissed. There's law that we cited to your Honor
17 that calls for that, because, as of today, June 15, there is no
18 consent. And, therefore, under those cases, there could be
19 dismissal.

20 In the altern --

21 THE COURT: What consent are you referring to?

22 MR. COHEN: The consent from the Bahamas Government,
23 as Mr. Rehn just laid out, and as the government conceded in
24 its papers. So we think dismissal of those counts would be the
25 better outcome obviously from our point of view, and also as

N6FDBANO

1 warranted under the cases we cited to your Honor, but in the
2 alternative, as we stated in our reply, and as the government
3 essentially agrees to in its letter, it's obviously still in
4 the Court's discretion under Rule 14, then we think those
5 counts should be severed. There is the matter of the campaign
6 finance count, and specialty, which I am happy to address now,
7 or to wait if the Court would like.

8 THE COURT: No. Let's take that later.

9 MR. COHEN: Okay.

10 THE COURT: Well, I'm not going to rule on this now.
11 I'm going to give it a little bit more thought. And for
12 purposes of this morning's festivities, I'll hear argument on
13 everything that two days ago we were expecting to hear argument
14 about, and then we'll have some other business at the end of
15 those arguments. I thank both sides for the letters of the
16 last couple of days.

17 That said, we can start with the rule of specialty. I
18 don't expect it to take a long time on this, and I do not have
19 infinite time, though I'm sure you guys could fill it up. So,
20 let's see, 45 minutes to a side, all in, with a short rebuttal.

21 So I will hear from Mr. Cohen, or Mr. Everdell, or
22 whoever's going to do the honors.

23 MR. COHEN: Yes, your Honor. Would you like me to be
24 at the podium?

25 THE COURT: Absolutely.

N6FDBANO

1 MR. COHEN: Given where I think the Court is in its
2 thinking, and as reflecting upon what we've called the new
3 charges, I won't address them in this argument unless your
4 Honor has further questions you'd like me to cover. And,
5 instead, I would like to address the campaign finance count.

6 THE COURT: Well, that's your call, and it's your
7 judgment --

8 MR. COHEN: Thank you, your Honor.

9 THE COURT: -- as to what I'm thinking.

10 MR. COHEN: Well, I guess we'll know soon enough, but
11 yes, on the new charges, and let me briefly, for record
12 purposes, your Honor, just make that record on what everyone
13 has been calling the new charges, which is everything added in
14 S3 and S5, except the campaign finance count. It is now
15 undisputed before this Court that the Bahamas U.S. Treaty
16 applies; that Article 14 of that treaty, which embodies the
17 rule of specialty, applies, as executed in the Bahamas by their
18 Extradition Act; that, under that rule, as the government has
19 stated today --

20 THE COURT: Their Extradition Act doesn't bind the
21 United States.

22 MR. COHEN: Correct. It's executing for them, because
23 our treaties are self-executing, their's are not. That's
24 right.

25 It's undisputed that the government, as Mr. Rehn just

N6FDBANO

1 repeated moments ago, has taken the position that it needs to
2 obtain consent from the Bahamas, and that consent has not been
3 obtained. In fact, if your Honor -- I don't know if your Honor
4 has had the opportunity to see Justice Klein's decision from
5 the Bahamas that we sent to the Court. It came out in a
6 decision that a formal request had not been made to the Bahamas
7 under the procedure required by the Bahamas until May 22nd,
8 which is three months after the S3 indictment was returned, two
9 months after the S5.

10 In light of all that, in light of the time, the
11 sequencing, which, by the way, is not a product of anything
12 this Court has done, or the defense has done, we think that
13 sequencing is another reason why, as we mentioned before, the
14 fair result here would be for the Court to dismiss the new
15 charges under the cases we cited in our briefs, and, in the
16 alternative, to set -- if need be, to sever them for another
17 trial.

18 Let me take up now the campaign finance charge, which
19 is --

20 THE COURT: Well, before you leave this, I mean, you
21 have a major problem on standing.

22 MR. COHEN: Well --

23 THE COURT: Whatever the Bahamas' complaints against
24 the United States may or may not be, the question is whether
25 your client has any right to raise them.

N6FDBANO

1 MR. COHEN: Right. Well, your Honor, again, we think,
2 as the government just pointed out, and it did in its letter,
3 in the facts of this case, the Court need not reach the issue,
4 because the government's taken the position, as your Honor just
5 brought out, for matters of policy and relations that it will
6 not proceed without consent.

7 So for purposes of this proceeding, in this case, the
8 Court need not reach the issue. However, if you'd like to, I
9 can address our view on that.

10 THE COURT: Well, I think you should.

11 MR. COHEN: Okay. Thank you, your Honor.

12 So, as we laid out in our papers, we think that under
13 the line of cases that begins all the way back with *Rauscher*, a
14 1886 case of the Supreme Court, through *Fiocconi*, and into
15 *Barinas*, that there is a way in which a defendant situated like
16 our client does have standing to raise these claims. And if
17 you look at what *Barinas* did, and that's the most recent
18 pronouncement on that, but the Court said, in the longer
19 passage, longer than the one that the government has been going
20 back and forth with us in the papers, what the Court said is
21 that absent -- this is at page 4 of my printout. I will get
22 the Court after this the cite from the case itself, but the
23 formulation was, absent an express provision in the agreement
24 between the states, any individual rights are only derivative
25 through the states, and absent protest or objection by the

N6FDBANO

1 offended sovereign, a defendant has no standing to raise the
2 violation of international law.

3 And then it goes on to the passage that we've been
4 fighting about, as to "would object." And, your Honor, our
5 view is that when the Court said, the Second Circuit said,
6 absent an express provision and absent protest, here we have an
7 express provision, here we have a protest, the decisions on
8 this area are driven by --

9 THE COURT: Where's the protest?

10 MR. COHEN: The protest is, and I believe it's now
11 undisputed, is the Bahamas has a standing objection to the U.S.
12 proceeding on new charges without it giving explicit consent.

13 THE COURT: But that's not what the case is talking
14 about.

15 MR. COHEN: Well, your Honor, I think it is, because
16 it's protest or objection. And, as I understood, at least the
17 government's original argument, they were arguing if the
18 Bahamas was silent, they could go forward. And now I think
19 they have come to the position that we have submitted, which is
20 supported by our expert affidavit, that the government -- that
21 the Bahamas must expressly consent to the new charges.

22 So, in effect, it is objecting, and it would object.
23 And the fact --

24 THE COURT: Well, I --

25 MR. COHEN: I'm sorry, your Honor.

N6FDBANO

1 THE COURT: I just don't get that at all, and,
2 furthermore, if you look at the treaty that was at issue in
3 *Barinas*, the treaty between the United States and the Dominican
4 Republic, I don't see a material difference in this respect
5 between the Bahamas treaty and the Dominican Republic treaty,
6 where the Second Circuit explicitly found no language
7 indicating that the Dominican Republic and the United States
8 intended the treaty to be enforceable by individuals.

9 MR. COHEN: Right. Your Honor, I think there's an
10 important difference, that 1909 treaty was much shorter. This
11 one has a built out -- the Bahamas treaty we're talking about
12 is built out, and it builds in this concept of requiring
13 express consent from the Bahamas, which --

14 THE COURT: But it does not address enforceability by
15 the individual.

16 MR. COHEN: Well, under *Barinas*, the individual's
17 rights derive from, right, under that line of cases, derive
18 from the rights of the request state, and that's the passage
19 that I was --

20 THE COURT: The individual's rights.

21 MR. COHEN: Right.

22 THE COURT: Such as they may be.

23 MR. COHEN: Right. So our position, your Honor, is
24 that under that line of -- under that language in *Barinas*, and
25 under *Fiocconi*, the defendant on these facts on this treaty,

N6FDBANO

1 the way it's now been construed, and I think both sides agree
2 on the construction, gives the defendant a right to be heard on
3 that and standing to proceed before your Honor. That's our
4 argument.

5 THE COURT: Okay. Now, let's not take up all your
6 time with this.

7 MR. COHEN: Okay. Well, whatever your Honor would
8 like to cover, I'm happy to cover. And, by the way, I
9 apologize for my voice, so --

10 THE COURT: There's nothing to apologize for.

11 MR. COHEN: I'm losing it.

12 Let me turn back to the campaign finance count, Count
13 12, because that's very important, your Honor. And our view is
14 that in light of what's happened with the rule of specialty,
15 and the proceedings in the Bahamas, that count should not
16 proceed to trial. That count should be dismissed.

17 There is an alterative approach that I will get to in
18 a moment that comes out of the government's letter last night
19 that we will also lay out for the Court. The argument here,
20 your Honor, and I think the thing to really emphasize is the
21 operative document coming out of the Bahamas on extradition is
22 the warrant of surrender, and -- hold on. If we look at the
23 warrant of surrender, which is Exhibit 2 to the Everdell
24 Declaration that we submitted with our opening papers, it has a
25 page, your Honor, called Schedule of Charges, and it lists --

N6FDBANO

1 starts, for example, fraud by mail, and then it lists the
2 analogous criminal law provision in the Bahamas.

3 THE COURT: I'm familiar with it.

4 MR. COHEN: Okay. So it gives the Bahamas' analog,
5 the U.S. Code provision, and the charge. It does not list the
6 campaign finance charge.

7 Now, we have submitted expert testimony by Mr. Lewis,
8 who's been an ex -- who's been in this area for 35 years, has
9 been, in fact, engaged by the DOJ and the U.S. government 100
10 times, that the operative document is this warrant of
11 surrender. And that makes sense, your Honor, because this we
12 think reflects a determination by the Bahamas that those counts
13 do not meet the dual criminality requirement in the Bahamas.
14 They could also be simply a reflection that no submission was
15 made, because it wasn't, under Article 8 of the treaty of facts
16 and materials that would give the minister an ability to make a
17 determination as to dual criminality.

18 But fundamentally, for purposes of this argument, it
19 almost doesn't matter. It's the warrant of surrender that
20 controls. And what the government does is it tries to get
21 behind it and say, well, Judge, you know, it was a mistake; it
22 was inadvertent; if you look at the record as a whole, that
23 record as a whole says that Mr. Bankman-Fried in fact consented
24 to this charge. And, again, under the interpretation of
25 Bahamian law that we have before this, with this uncontradicted

N6FDBANO

1 declaration from Mr. Lewis, that's just not how the analysis
2 proceeds.

3 But even if you were to take on these arguments, if we
4 were to take them on, your Honor, we don't think they carry the
5 day. The government makes a lot about --

6 THE COURT: Do you acknowledge that he did, in fact,
7 consent to it?

8 MR. COHEN: What we acknowledge is he consented to
9 simplified extradition, which your Honor must have my notes in
10 front of you, because that was the next point I was getting to.
11 What the record shows is he consented to simplified
12 extradition, and what that meant was he consented to not having
13 a long, extensive, formal proceeding in the Bahamas. The
14 charges he would be extradited on were then up to the minister
15 to decide in accordance with their laws of the Bahamas.

16 THE COURT: Did he consent to the minister extraditing
17 him on what is now Count 12 I think?

18 MR. COHEN: No, he did not, because he consented to
19 being extradited on what the operative document said he'd be
20 extradited on, which is the warrant of surrender. The minister
21 could have decided -- all he did --

22 THE COURT: So your position is when he consented to
23 the simplified extradition, he had no idea what he was being
24 extradited to face?

25 MR. COHEN: He certainly had an idea of the counts

N6FDBANO

1 that he could be extradited on for sure, your Honor. There
2 were eight counts presented. The minister could have --

3 THE COURT: One of them was the campaign finance.

4 MR. COHEN: Yes, of course. Of course. So it wasn't
5 no idea, but it was then the minister made a determination.
6 That was our argument.

7 THE COURT: So your view is that your client consented
8 to being extradited by simplified procedure on all of the then
9 extant counts, including what is now Count 12, and the
10 minister, for God knows what reason, executed this warrant, and
11 I'm not entitled to look at what your client consented to and
12 what the minister intended to do when he granted an unopposed
13 request?

14 MR. COHEN: We're saying that the problem with look --
15 the problem with looking at it is there's now competing
16 arguments as to what the minister intended, and that's why we
17 cited the presumption of irregularity of these proceedings.
18 That's why we shouldn't be getting into, we, the parties or the
19 Court, shouldn't be getting into what he intended.

20 And your Honor's question leads me to our alternative
21 suggestion, which comes out of the letter of last night.

22 THE COURT: Well, as to the alternative suggestion,
23 between the consent to the simplified extradition and the
24 minister's execution of the warrant, was any presentation or
25 communication made on behalf of the defendant to the minister

N6FDBANO

1 or his subordinates with respect to the scope of the warrant
2 that he should approve?

3 MR. COHEN: No, your Honor.

4 THE COURT: Okay.

5 MR. COHEN: I can't speak for what the government
6 presented or not, but no.

7 THE COURT: I didn't ask you about that.

8 MR. COHEN: I know.

9 The alternative approach, your Honor, if your Honor is
10 inclined to sever the new charges that we've been talking
11 about, we would suggest respectfully, and as an alternative,
12 that the Court also sever the campaign finance charge, because
13 here we are, all of us, trying to get at what the Bahamas
14 intended when it did not include this in the schedule of
15 charges, and the simplest way to find out what the Bahamas
16 intend is to ask them and to bring a proceeding in the Bahamas,
17 either the government or us or both, where we can get clarity
18 that we can then convey to the Court.

19 THE COURT: Okay.

20 MR. COHEN: All right. Your Honor, I think I've used
21 up my time, so I'm going to turn it over to Mr. Everdell.

22 THE COURT: Thank you.

23 MR. COHEN: Thank you.

24 MR. EVERDELL: Thank you, your Honor.

25 I'm going to address the motions to dismiss the bank

N6FDBANO

1 fraud, conspiracy count, Count 9, and the wire fraud counts
2 against Alameda's lenders, which are Counts 7 and 8, and the
3 wire fraud against FTX customers, which are Counts 1 and 2.

4 THE COURT: I'm sorry. So give me the numbers again.

5 MR. EVERDELL: Sure. The first is Count 9, which is
6 the bank fraud conspiracy; then Counts 7 and 8 are the wire
7 fraud and wire fraud conspiracy against Alameda's lenders; and
8 Counts 1 and 2 are the wire fraud and wire fraud conspiracy
9 against FTX customers.

10 THE COURT: Thank you.

11 MR. EVERDELL: Your Honor, as we set forth in our
12 motions, these counts do not allege a valid property interest
13 that can support federal fraud charges, and are based on the
14 now invalid right to control theory of property fraud that was
15 struck down by unanimous decision of the Supreme Court just one
16 month ago in *Ciminelli v. United States*. The government, now
17 aware of *Ciminelli*, seems to recognize that the allegations in
18 the S5 indictment, do not allege valid fraud charges, and so
19 they're trying to pivot abruptly. They assert for the very
20 first time in opposition brief new theories of fraud that were
21 not alleged in the S5 indictment and never presented to the
22 grand jury. And they attempt to make the case that these
23 theories were in the S5 indictment all along, but that's simply
24 incorrect.

25 The Court not should not allow the government to

N6FDBANO

1 retroactively amend the indictment by asserting new allegations
2 and new charging theories in their opposition brief, and they
3 shouldn't allow the charges to proceed based on invalid and
4 insufficient theories, so they must be dismissed.

5 I will start first, Judge, with the bank fraud
6 conspiracy. Mr. Bankman-Fried is charged under the second
7 subsection of the bank fraud statute, which is 18 U.S.C.
8 1344(2). And, your Honor, what the government is trying to do
9 with this count is take what is fundamentally an allegation of
10 wire fraud against FTX customers and turn it into a bank fraud
11 charge, but this doesn't hold water for several reasons.

12 First, the bank fraud count, as it's actually pled in
13 the S5 indictment, is charged under the invalid right to
14 control theory. The allegations concerning the bank fraud
15 count, your Honor, are found in paragraph's 14 to 21, but those
16 paragraphs are very clear. They do not allege that
17 Mr. Bankman-Fried mislead bank one to steal money from the
18 bank, which is what the government is now claiming in their
19 opposition brief.

20 Those paragraphs allege that Mr. Bankman-Fried mislead
21 Bank One to trick the bank into opening a bank account for
22 North Dimension, so that it could receive deposits. In other
23 words, the alleged bank fraud relates to the opening of the
24 bank account, not any misappropriation of customer funds.

25 THE COURT: Well, I think you take a very narrow view

N6FDBANO

1 of Count 9 --

2 MR. EVERDELL: Well, your Honor --

3 THE COURT: -- and what goes before it in the
4 indictment.

5 MR. EVERDELL: Your Honor, I'm looking at the
6 allegations, specifically in the bank fraud count, and it talks
7 about -- for example, I quote from paragraph 14, FTX needed
8 bank accounts that would allow FTX customers to deposit dollars
9 with FTX, and then it says that FTX -- the bank one told FTX
10 they wouldn't open the bank account for FTX.

11 THE COURT: Right.

12 MR. EVERDELL: So they gave them false information,
13 and, as a result, the bank approved the opening of the North
14 Dimension account.

15 THE COURT: And he did all this, according to the
16 indictment as I read it, in order to create a vehicle secretly
17 under the control and influence of Alameda, which was, in turn,
18 under control of your client, and then used that control
19 regularly to take money from those accounts for his own
20 purposes.

21 MR. EVERDELL: Your Honor, I think what you're
22 referring to there is sort of what I was saying before, that
23 refers to the fraud against the FTX customers. What you're
24 describing there is the alleged fraud about taking the customer
25 deposits, but it's not referring to the fraud against the bank.

N6FDBANO

1 THE COURT: You can't parse is that finely I don't
2 believe.

3 MR. EVERDELL: Well --

4 THE COURT: Furthermore, this idea, and I've voiced
5 the tentative conclusion, so that you know and you would have a
6 chance to respond to it, that the indictment has to allege a
7 theory as opposed to the elements, basically, it doesn't hold
8 water, at least in this circuit.

9 MR. EVERDELL: Well, your Honor, I think the cases we
10 cite in our brief, including the *Piro* case, which says the
11 indictment requires -- the indictment clause of the Fifth
12 Amendment requires that an indictment contain some amount of
13 factual particularity to ensure that the prosecution will not
14 fill in elements of its case with facts other than those
15 considered by the grand jury. And that's what I'm getting at
16 here, your Honor. I'm looking at the indictment to see what
17 they actually allege, what facts they actually allege, and
18 whether those facts as they allege support a valid theory of
19 fraud.

20 And as I look at the allegations that relate to the
21 bank fraud count, they are targeted towards the opening of the
22 account. And the cases are clear that if it's fraudulently
23 opening of the account, you're not depriving the bank of any of
24 the bank's property. You're not taking funds, you're not
25 convincing the bank to release funds or divert funds elsewhere

N6FDBANO

1 by fraudulent means.

2 THE COURT: He allegedly did it for the purpose of
3 getting his hands on the customer funds for the benefit of
4 Alameda and himself.

5 MR. EVERDELL: Right, and I think --

6 THE COURT: That's right in the paragraphs in the
7 complaint that are incorporated by reference in Count 9.

8 MR. EVERDELL: But I guess where I'm respectfully
9 disagreeing with the Court is I don't see how that is taking
10 bank property, because to defraud the bank --

11 THE COURT: Well, *Shaw* I believe dealt with that.

12 MR. EVERDELL: Well, I don't think so, your Honor,
13 because I think we have a different situation here than *in*
14 *Shaw*. In *Shaw*, the situation was that the defendant basically
15 impersonated an account holder, a different account holder. He
16 had that person's identification and credentials, and told the
17 bank, impersonating this other person, to divert funds to a
18 different account, to himself, away from the actual account
19 holder.

20 So, in that case, the funds that were diverted, yes,
21 *Shaw* says that the bank has some property interest in customer
22 deposits, but, in that case, what was happening is the
23 defendant was misleading the bank to get the bank to divert
24 bank funds to himself, to another count from funds that were
25 held in the account of a different person.

N6FDBANO

1 Now, in this case, your Honor, Bank One, the account
2 was held in the name of North Dimension, and the customer
3 deposits were going into North Dimension. So from Bank One's
4 perspective, the account was held by North Dimension. They
5 were the lawful owners of those funds from Bank One's
6 perspective. Right?

7 THE COURT: Who were the lawful owners?

8 MR. EVERDELL: North Dimension -- when the funds hit
9 the North Dimension account, from Bank One's perspective, those
10 are North Dimension's funds. And so if account holders of the
11 North Dimension account, which is alleged to be Mr.
12 Bankman-Fried and others, then tell Bank One, we want to move
13 money out of this account, we want to withdraw it, we want to
14 transfer it, from Bank One's perspective, that's their money,
15 because -- they're allowed to do that, because --

16 THE COURT: It's not exactly the bank's money. You're
17 overlooking one of the key passages in *Shaw*, "when a customer
18 deposits funds, the bank ordinarily becomes the owner of the
19 funds, and consequently has the right to use the funds as a
20 source of loans that help the bank earn profits, though the
21 customer retains the right, for example, to withdraw funds."
22 So that property in a depositor account in a bank is property
23 in one sense of the bank's, and in another sense, of the
24 account holder.

25 When we all went to law school, we learned in property

N6FDBANO

1 one that the whole concept of property is a bundle of rights.

2 MR. EVERDELL: That's correct.

3 THE COURT: In this case, some of the bundle is the
4 bank's, and some of the bundle belongs to the customers. Just
5 as if you owned 40 acres on which there was a driveway to your
6 neighbor's property across it, no doubt you own the 40 acres,
7 and if there's an easement that your neighbor has to get to his
8 house over your property, he owns the property right in the
9 right to use your property for the limited purpose of going to
10 his property. It's no different.

11 MR. EVERDELL: Yes, your Honor, but I think that the
12 bank's interest, whatever property the bank has in their
13 customer deposits, if we're talking about the customer's own
14 funds in their own account, that property interest ends at the
15 point when that customer says, I want to withdraw those funds,
16 or I want to transfer those funds. So certainly while the
17 funds are sitting in that customer's account, as *Shaw* says, the
18 bank has a limited property interest. They can use it to loan
19 it out, they can make money off of it, they can do other things
20 with it, but as soon as the customer tells -- the customer
21 whose funds those are, who is the holder of the account, says,
22 I want to retrieve those funds, the bank's interest in those
23 funds stops. Those are the customer's funds. They can
24 withdraw them. And I think that is what *Shaw* says.

25 THE COURT: They are the depositor's funds.

N6FDBANO

1 MR. EVERDELL: In this case, it's not clear to me,
2 Judge, and I don't think it's alleged that they were held in
3 the North Dimension account for the benefit of the depositor.
4 I think they were given to North Dimension, they were given
5 obviously to fund the FTX account with an equivalent amount of
6 money, but those funds were belonging to North Dimension. And
7 there's nothing in the indictment that says there's some sort
8 of lingering obligation or --

9 THE COURT: The providers of the money, the ultimate
10 providers of the money, had no further property interest in it?
11 That's your position?

12 MR. EVERDELL: Well, what they have, your Honor, what
13 the customers have at that point, is they are given an
14 equivalent amount of money on the FTX exchange, and they can
15 use that to trade. So they have the right to use the money
16 that is leveraged over to FTX to make cryptocurrency trades.
17 Right? They also have the right to withdraw an equivalent
18 amount. Obviously when they send the funds in, money is
19 fungible, they don't get those specific deposits, but they can
20 withdraw an equivalent amount. Right?

21 So certainly, if they want to, they can say I want my
22 money back, I want my cash back, and they have that right, too,
23 but --

24 THE COURT: Which is property.

25 MR. EVERDELL: Well, when they withdraw it, it's their

N6FDBANO

1 property. But what the difference is I think with *Shaw* --

2 THE COURT: The right to withdraw is property.

3 MR. EVERDELL: The right to -- the right to get your
4 money back, it's a little like right to collect a debt, which I
5 think we're going to talk later.

6 THE COURT: Which is also property.

7 MR. EVERDELL: But what I think I'm getting at here
8 with the bank fraud count, your Honor, because I think we're
9 conflating what is the fraud against the alleged -- fraud
10 against the customers versus the alleged fraud against the
11 bank. And the bank, in order to defraud the bank, what
12 *Ciminelli* says is there has to be a traditional property
13 interest that the bank has to be able to take the bank's
14 property, because you have to defraud the financial institution
15 under the bank fraud statute, so you have to be taking the
16 bank's property.

17 In this case, the bank doesn't have -- at the point
18 where the holders of the North Dimension account try to
19 withdraw the funds from the North Dimension account or transfer
20 it, the bank's interest in that property stops, because from
21 the bank's perspective, that money belongs to North Dimension.
22 And so we're not defrauding the bank of its property. They
23 have the right to use it, to lend out, to make loans, and do
24 whatever they want to do with it while it is sitting in the
25 account, but when North Dimension account holders say they want

N6FDBANO

1 that back, or want to transfer it somewhere, from the bank's
2 point of view, they're not being defrauded from any of their
3 property interest. Whatever it may be, what the providence of
4 those funds were, and the allegations of fraud on the
5 customers, we're talking about the bank's property when it
6 comes to the bank fraud statute.

7 And they have not been actually deprived of their
8 property at that point. They've had the full use of whatever
9 property rights they had to lend out money while the money was
10 sitting there, but when the customer, in this case the North
11 Dimension account holders, comes to the bank and says, I would
12 like those monies transferred, it's not the bank's property
13 that's being defrauded, it's not the bank's property that's
14 being taken, separate and apart from anything to do with the
15 customer.

16 So, your Honor, I don't think that *Shaw* is controlling
17 here. I think that under this situation, it's different, and
18 we don't have -- we do not have a bank fraud.

19 Your Honor, also, I would point out that there is
20 no -- in the indictment, there is no relational component
21 between the false statements and the movement of the funds out
22 of the bank, right, because *Loughrin v. the United States* says
23 that, it's not enough that a fraudster's scheme to obtain money
24 from a bank and that he made a false statement. The provision
25 as well includes a relationship component. The criminal must

N6FDBANO

1 acquire or attempt to acquire bank property by means of a
2 misrepresentation."

3 So there has to be a nexus between the
4 misrepresentation and the acquisition of the bank's property.
5 In the indictment, there is no allegation, as far as I can see,
6 of a misstatement given to Bank One in order to trick Bank One
7 to release funds from the North Dimension bank account.
8 There's no misrepresentations alleged that related to that at
9 all. All of the misrepresentations that are in the indictment
10 relate to the opening of the account, not to the release of
11 funds.

12 So under *Loughrin*, there is no relational component
13 here. It's simply been failed to be alleged here. There is no
14 way that the indictment establishes the bank fraud, because all
15 of the misrepresentations that are there refer to the opening
16 of the account, the information given to Bank One to determine
17 whether or not to open the account. And so under that
18 standard, your Honor, under that case, that is a separate and
19 independent reason why the allegations in the indictment do not
20 establish a valid bank fraud charge.

21 Your Honor, unless there's further -- in the interest
22 of time, I should probably move on to the next count. Okay.
23 So now I'll address briefly the lender counts, your Honor,
24 which are 7 and 8. And I think with these counts, Judge, the
25 government is trying to do what the Supreme Court cautioned

N6FDBANO

1 again in *Ciminelli*, which is trying to criminalized a
2 traditionally civil matter by turning a contract dispute into a
3 federal fraud crime. So just like the bank fraud count, Your
4 Honor, they're trying to introduce a new charging theory in
5 their opposition brief.

6 Now, the new theory, as I see it, in opposition brief
7 contains two elements, right, that the lenders were deprived of
8 their new money in the sense that money of lenders would have
9 given Alameda as a part of the new loan agreements, right; and
10 the right to call existing loans. So there's the existing
11 loans which they were deprived of the right to recall, and
12 according to what's alleged in the brief at least, there were
13 these rights to -- they approached them for new loans, so they
14 were seeking new money from the lenders.

15 Now, on that, your Honor, as to the new loans, there
16 is nothing whatsoever in the indictment alleging anything about
17 going to seek new loans from the Alameda lenders. What the
18 indictment talks about is there is a downturn in the markets,
19 and the lenders want their funds returned, and so there's an
20 issue about this, and there's an attempt to deal with this
21 problem. But it is all about the lenders and the existing
22 loans, and them trying to get back their existing loans. It
23 says nothing about Mr. Bankman-Fried or anybody else going to
24 lenders to get new loans. That's totally invented in the
25 opposition briefs, nowhere in the indictment.

N6FDBANO

1 And that's significant, your Honor, because that is, I
2 think, an attempt to try to get around *Ciminelli*, because that
3 alleges, theoretically, a fraud in the inducement, right? So
4 they're going to the lenders to try to get new loans, making
5 false representations to get their money right from the get go,
6 fraud in the inducement.

7 That's not alleged, right? If anything is alleged it
8 is this right -- it is the deprivation of this right to collect
9 an existing loan; and, your Honor, that is not an actual right
10 that is sufficient to sustain a property fraud claim, and
11 here's why. What we have there, if the property interest is
12 anything, it is the right to collect. Well, I think that's
13 based on a misunderstanding of what the lenders' rights
14 actually are. The lenders' rights derive entirely from the
15 loan agreements, which the government does not cite in the
16 indictment.

17 They clearly don't have a property interest in the
18 specific funds that they gave to Alameda, right? When lenders
19 loan money, when you loan money to somebody, the borrower owns
20 those funds. It's the borrower's funds. You do have a right
21 to collect your loan, and that's usually dictated by the terms
22 of the loan agreement of when and how and those terms, but the
23 money itself is with the borrower. It's their property. So
24 the specific loan funds, they do not have an interest in.

25 The only potential interest they have is the right to

N6FDBANO

1 collect at a later time, but here, your Honor, the lenders have
2 not been deprived of that right. In fact, our understanding is
3 they are vigorously exercising those rights in the bankruptcy
4 proceedings. As we speak, they are trying to collect the money
5 that's owed to them. So the right to collect, to the extent
6 that it is a property right, has not been deprived, right?

7 And it is true that you do not have to cause actual
8 loss to have a wire fraud offense, but what you do have to
9 prove is that the scheme, if it were successful, would result
10 in economic harm to the victim. And here, Judge, as alleged,
11 this scheme was successful in the sense that false financial
12 information caused the lenders to hold off calling the loans.
13 But lenders did not lose the right to collect. They still have
14 it. So that cannot form the basis of the property fraud
15 claims -- or the wire fraud claims against them.

16 THE COURT: It's been impaired a little bit, don't you
17 think?

18 MR. EVERDELL: Sorry, your Honor?

19 THE COURT: It's been impaired a little bit, don't you
20 think?

21 MR. EVERDELL: Well, I don't know if it's been
22 impaired. The right itself exists. Whether or not there are
23 sufficient funds to cover the outstanding amounts, I guess
24 that's up to the bankruptcy to decide. But the right itself
25 exists, and the right is something that can be exercised.

N6FDBANO

1 And, to be honest, Judge, there certainly is not an
2 allegation I think that the intent of the scheme was to deprive
3 them of their rights to collect, right? It was -- I mean, they
4 still have it, so that's -- that doesn't hold water in my view.

5 Your Honor, I think -- we cited the *Adler* case, which
6 I don't want to take time going through, because I'm sure your
7 Honor's read the briefs. I think it's very much on point,
8 where Judge Luttig addressed a very similar situation, and said
9 the right to collect a debt is maybe a property right, but it
10 is not one that has been deprived here. And so the same
11 situation applies here.

12 Your Honor, I'll finally move to the wire fraud
13 against the customers. And what I think is going on here is
14 that, you know, the government is alleging that
15 Mr. Bankman-Fried deprived the FTX customers of funds they
16 deposited on the exchange. But once again I think we need to
17 be clear about what the property right is, what rights and
18 interests did the FTX customers have once they deposited their
19 funds on FTX.

20 And the indictment alleges first that the customers
21 received a credit, a corresponding credit that they could use
22 to trade. So this is not a situation like the *Merrill* case
23 that the government cited where the customers were actually
24 deprived of their funds, their funds were actually tied up and
25 they couldn't use them. They could use them. They used them

N6FDBANO

1 in the form of a credit to be able to trade. It was an
2 equivalent amount. And the customers had a contractual right
3 to be repaid an equivalent amount on demand, but, again, the
4 customers were not deprived of that right. They have that
5 right. They are looking to exercise that right.

6 Now, these, I don't think create a valid fraud theory.
7 And, again, in the interest of time, your Honor, I will rest on
8 the papers unless the Court has questions.

9 THE COURT: Thank you. I congratulate you on an
10 extraordinarily imaginative argument.

11 MR. EVERDELL: Thank you, your Honor.

12 THE COURT: Counsel.

13 I'm sorry. You're rising, Mr. Cohen. Are you --

14 MR. COHEN: We had thought we had a bit more time,
15 your Honor.

16 THE COURT: You have five minutes.

17 MR. COHEN: We have five minutes. All right. Then
18 one moment, your Honor.

19 So, your Honor, in the four and a half minutes I now
20 have, let me briefly touch on the motion that we made for *Brady*
21 disclosures and discovery.

22 THE COURT: Well, I'm going to deal with that
23 separately.

24 MR. COHEN: Okay. Your Honor doesn't need --

25 THE COURT: We'll deal with that later.

N6FDBANO

1 MR. COHEN: Okay. Then --

2 THE COURT: All right. Who's going to argue this one
3 for the government?

4 MR. REHN: Good morning, your Honor.

5 THE COURT: Good morning.

6 MR. REHN: I was planning to address any specialty
7 issues that the Court had, and also the fraud counts that took
8 up the majority of the defense counsels' time.

9 THE COURT: Yes. I think on the specialty, if you
10 would just address briefly the argument which, if I were to
11 adopt it, would ignore the fact that the defendant consented to
12 simplified extradition, and there was apparently no doubt in
13 anybody's mind, including his, as to what he was consenting to;
14 but I'm to blind myself to that, and focus on the omission of
15 what is now Count 12 in the documents signed by the minister.
16 Is that it?

17 MR. REHN: Yes, your Honor. I think, as to that
18 issue -- and we do think defendant's consent is important, but
19 leaving that aside for the moment, there's two reasons why it
20 -- that does not invalidate proceeding on the campaign finance
21 count. The first reason, very importantly, is that the
22 defendant lacks standing to raise that issue in this court, and
23 I think that's especially warranted here.

24 This case kind of illustrates the wisdom of the Second
25 Circuit's rule on standing, because what the defense is asking

N6FDBANO

1 the Court to do is basically insert itself into a series of
2 Bahamian legal questions combined with issues of diplomatic
3 communications between two sovereign nations about the precise
4 meaning of the extradition that took place here. And that's
5 really something that doesn't need to be done, because it's a
6 matter for the diplomatic relationship between the United
7 States and the Bahamas.

8 So just on the Second Circuit's standing
9 jurisprudence, the Court should deny the defendant's motion
10 challenging this count.

11 THE COURT: Implicit in that argument is that I should
12 reject the defendant's argument with respect to all the other
13 new counts as to standing, yes?

14 MR. REHN: That's correct, your Honor, and we think
15 that is a reason not to dismiss those counts. As we discussed
16 earlier, the government would not proceed, in any event, on
17 those counts absent -- because the United States does take its
18 diplomatic obligations seriously.

19 THE COURT: Yes, so that's a diplomatic policy
20 decision, not a concession on the legal point.

21 MR. REHN: That's correct, your Honor.

22 THE COURT: Okay.

23 MR. REHN: Now, if the Court were to inquire into the
24 extradition record, I think we acknowledge there is ambiguity
25 here, but if you look at what the courts have done, and I think

N6FDBANO

1 the most important decision is the Second Circuit's decision in
2 the *Levy* case, where that case was actually less favorable to
3 the government than this case, because in that case, the
4 government's own extradition request did not even mention the
5 count being contested by the defendant; and then in the order
6 granting extradition from the country, it just referred to the
7 charges in the indictment, and there was no indication in the
8 record that the extraditing country had specifically been
9 notified of or had considered the contested count, because it
10 wasn't even in the government's initial extradition request.
11 And, nonetheless, the Second Circuit said, that's a sufficient
12 record, because we will not interpret the record narrowly;
13 we're going to assume that the -- the United States is
14 proceeding in accordance with an understanding of the
15 extraditing country that it can proceed on the charges for
16 which it sought extradition.

17 THE COURT: Here the record supports the view what is
18 now in Count 12 was in the extradition request.

19 MR. REHN: Certainly, and I don't think it's contested
20 the count was in the extradition request. The defendant had a
21 copy of the extradition request, said in writing that he had
22 reviewed all of the counts in that, and that he was consenting
23 to extradition on those counts. Then he goes to the Bahamian
24 court, and I think this is very important, because other cases
25 from other circuits who have looked at this have said, well,

N6FDBANO

1 did the courts consider whether this count was part of the
2 extradition or not, so to the extent that this Court were to
3 inquire into the extradition record, it would be appropriate to
4 look at what the Bahamian Court did, and the Bahamian Court
5 expressly listed all of the counts, including the campaign
6 finance count, and stated that this is one of the charges that
7 the defendant will have to answer to upon extradition. So it
8 was the understanding of all of the parties involved that this
9 was part of the record of extradition.

10 Subsequently, after all of that happened, the minister
11 of foreign affairs issued this warrant, which is actually just
12 addressed to the Bahamian Police, authorizing them to turn over
13 the defendant to the United States. It's not even expressed
14 directly to the United States. And we acknowledge that warrant
15 does not specifically reference this count, although it does
16 reference the defendant's consent and the Bahamian Court's
17 order that listed this as one of the counts of extradition.

18 And so considering that record on the whole, we don't
19 think that the Court should narrowly focus on the omission of
20 this count in the attachments to the surrender warrant to the
21 exclusion of the other evidence that this was part of the
22 extradition.

23 THE COURT: Okay. Thank you.

24 MR. REHN: Your Honor, with respect to the fraud
25 counts, I'll be brief, and I'm happy to address any particular

N6FDBANO

1 questions that the Court has, but I'll just go through them.
2 On the bank fraud count, I think that there's two separate
3 prongs to the defendant's argument as to both of which the
4 defendant is just misreading the case law. So I think the
5 defense gives away the game when they said at one point in
6 their argument that, you have to defraud a financial
7 institution in order to succeed on this count. That's directly
8 contrary to the Supreme Court's holding in *Loughrin* when it
9 says that for a prosecution under 1344(2) alleging a scheme to
10 obtain money or property in the custody of the bank, there is
11 no requirement that the government prove the defendant
12 defrauded a financial institution.

13 And that dovetails with the Supreme Court's decision
14 in *Shaw*, which the Court is very familiar with, saying that a
15 scheme to obtain property or money in the custody of the bank
16 is a bank fraud, regardless of whether the bank itself was
17 defrauded or suffered any loss, and that is exactly what is
18 alleged here.

19 THE COURT: Well, of course, Mr. Everdell says it's
20 not property in the custody of the bank. It is property that
21 belongs to the bank, for whatever analytical force that has.

22 MR. REHN: And that's exactly the reason why the bank
23 fraud statute has this separate prong that criminalizes any
24 attempt to obtain property in the custody of the bank.
25 Basically, the bank fraud statute broadly applies to schemes to

N6FDBANO

1 obtain money that the bank has. Whether it's the bank's
2 property or the property of depositors in the bank, the issue
3 is the defendant made false statements to a bank for the
4 purpose of obtaining property that the bank held. And
5 certainly the indictment alleges the bank did withdraw funds
6 from that bank account for his own purposes, and that's
7 certainly sufficient under these cases that we've discussed in
8 our brief.

9 I would just highlight one case in particular, the
10 *Lebedev* case from the Second Circuit, which is very similar to
11 this case. And just the very first paragraph of *Lebedev* says
12 in that case the defendant "opened bank accounts in the name
13 of," and then it lists a phoney company that the defendant
14 provided to the bank in that case when they opened that
15 account. And then the defendant subsequently used that account
16 to facilitate, interestingly enough, customer deposits onto an
17 offer of -- cryptocurrency exchange.

18 *Lebedev* is exactly the theory that's at issue here
19 that the Second Circuit upheld, so the Court should also uphold
20 the theory in this case as well. It has nothing to do with the
21 right to control that was the issue in *Ciminelli*.

22 With respect to the lender fraud, the defense is right
23 that there's two prongs -- there's two ways in which lenders
24 were defrauded. They were defrauded by providing new money, to
25 the -- lending new money to the defendant's companies in

N6FDBANO

1 reliance on fraudulent misrepresentations, and they were
2 defrauded in forbearing their right to demand immediate
3 repayment of loans they had already made. And the indictment,
4 conveniently enough, lists both of these in the account, money
5 and property. Both of those are well-established property
6 interests that are alleged in the indictment, that the
7 defendant obtained by means of his fraud.

8 Focusing on the second one, the right to call existing
9 loans, the indictment specifically alleges in paragraph 32 that
10 Alameda was required to repay its loans on demand. So this
11 idea that the lenders were not deprived of a property interest
12 when they forbore on executing that immediate right to
13 repayment, simply doesn't hold water. That ability to obtain
14 repayment on demand is an extremely important contractual
15 property right in the context of a loan that the lenders lost
16 as a result of the defendant's fraud.

17 THE COURT: Well, Mr. Everdell's argument is they
18 didn't lose it; they can demand all they want for the rest of
19 time.

20 MR. REHN: Well, there's a big difference between
21 demanding immediate repayment in July of 2022 and seeking
22 repayment now post bankruptcy.

23 THE COURT: His point really is they had the right,
24 they didn't exercise it, but they had the right.

25 MR. REHN: But not exercising a right is being

N6FDBANO

1 deprived of that right if the reason you don't exercise a
2 contractual property right is because of a defendant's
3 fraudulent statements.

4 THE COURT: Your argument is the right to demand
5 payment was taken them by the fraud.

6 MR. REHN: That's correct, your Honor. And they've
7 lost obviously significantly.

8 And I would just highlight the *Pasquantino* Supreme
9 Court case from 2005, 544 U.S. 349, at 357, which says, the
10 right to be paid money has long been thought to be a species of
11 property. Fraud at common law included a scheme to deprive a
12 victim of his entitlement to money. And certainly that's
13 what's alleged here with respect to these lenders, in addition
14 to the fact that the lenders made additional new loans based on
15 the defendant's fraudulent statements in the summer of 2022.

16 And then just very briefly on the customer fraud, I
17 don't think the defense really has any argument here. The most
18 traditional theory of wire fraud that has been long recognized
19 is misappropriation of funds that are entrusted to a defendant.
20 Misappropriation is exactly what's laid out in Counts 1 and 2.
21 The customers were certainly defrauded by a series of false
22 representations about how the customers' deposits would be
23 handled, about the customer protections that were purportedly
24 in place on the platform. And they've made those deposits.
25 The defendant misappropriated those funds. And that's about as

N6FDBANO

1 traditional wire fraud theory as you can get.

2 So unless the Court has questions on that --

3 THE COURT: No. Thank you.

4 Ms. Sassoon.

5 MS. SASSOON: Your Honor, given that we have not I
6 don't think used up our 45 minutes, if your Honor does have
7 questions or concerns with any of our other arguments regarding
8 any of the motions to dismiss any of either counts, we can
9 address them.

10 THE COURT: I don't think that will be necessary. I
11 think we can turn to the questions that I had my deputy raise
12 with both sides, and to the discovery arguments.

13 I have the government's letter on the status of
14 discovery dated the 14th of June, so let me start there. In
15 the second paragraph of the letter, the government states that
16 it has now made seven discovery -- I imagine the word
17 "productions" got lost -- which were accompanied by detailed
18 indexes, and include the materials discoverable under Rule 16,
19 et cetera.

20 I take it that means you are telling me you have made
21 all of the Rule 16 disclosures of everything in the possession,
22 custody, or control of the government? Was that the other word
23 left out?

24 MR. ROOS: Yes. First of all, your Honor, apologies
25 for the missing words here. Clearly the timing of the --

N6FDBANO

1 timing of the letter betrays that probably we could have read
2 it again.

3 THE COURT: At least you didn't blame it on one of
4 these AI crypt devices.

5 MR. ROOS: That's right. I'm sure --

6 THE COURT: I'd have to send you to Judge Castel
7 immediately.

8 MR. ROOS: I'm sure it would have at least written a
9 full sentence, if not cited a fake case.

10 To answer your Honor's question, the answer is yes,
11 subject to the various outstanding items that are listed on
12 pages 2 and 3 of the letter that we're providing -- that we
13 provided updates on --

14 THE COURT: Yes, but the outstanding -- there are
15 almost no outstanding items listed. There is the Slack data,
16 which needs to be converted into files loadable into Relativity
17 and screened, and then you're going to produce that; and there
18 are some documents identified in paragraph 3 that are in the
19 process of being translated. So with the amendment of those
20 two items -- the exclusion, everything else that the government
21 is obliged to produce under Rule 16, and that is within its
22 possession, custody, or control, has by now been produced.

23 Is that right?

24 MR. ROOS: I just wanted to add, highlight sort of the
25 two other caveats. So in paragraph 2 at the end it notes a

N6FDBANO

1 very small volume of additional Google documents we're
2 anticipating getting from Google and producing. Basically,
3 Google made an incomplete production.

4 THE COURT: Yes. I noted that, but what you say in
5 that paragraph is you currently don't have them.

6 MR. ROOS: Correct, your Honor.

7 THE COURT: Okay.

8 MR. ROOS: And the other is paragraph 5 there is a
9 discussion of cell phones that were seized, one of which is
10 accessible. And there's a -- I would say an ongoing
11 conversation about whether that's something that either party
12 would consider to be Rule 16 in this case.

13 The final caveat would be paragraph six, which is just
14 an acknowledgment that many parties, including the FTX debtors
15 and several parties who have been subpoenaed, continue to
16 produce these things.

17 THE COURT: That's not in your possession, custody, or
18 control either.

19 MR. ROOS: That's correct, your Honor.

20 So you're right, just the two paragraphs that you
21 highlighted are in the possession, custody, or control.

22 THE COURT: All right. Now, Mr. Cohen, is there any
23 dispute about that? Or is it Mr. Everdell?

24 MR. COHEN: Mr. Everdell will handle this, your Honor.

25 MR. EVERDELL: Well, your Honor, I note that there are

N6FDBANO

1 ongoing subpoena return productions.

2 THE COURT: So the second time I note we don't have to
3 talk about that.

4 MR. EVERDELL: Sure. I note that in paragraph 8, we
5 can talk about the FTX code. I know the government is claiming
6 that they don't have an obligation to get this, but it seems
7 like they're agreeing now to obtain the FTX codebase and
8 codebase history, which is what we've been asking for.

9 THE COURT: I'm sorry. Finish.

10 MR. EVERDELL: Yes. The codebase history is what
11 we've been asking for. This is no. 8.

12 THE COURT: Well, they've agreed that they've talked
13 to FTX about it.

14 MR. EVERDELL: Yes.

15 THE COURT: They haven't agreed to give it to you.
16 They don't know whether they're going to get it I assume.

17 MR. EVERDELL: Well, understood, your Honor.
18 Obviously we're very eager to get those, and --

19 THE COURT: Well, I'm sure you are, but that doesn't
20 mean they have it.

21 MR. EVERDELL: Yes. That's true. But to the extent
22 they're agreeing to request it and get it, then that's
23 something we need to get to.

24 THE COURT: Right. They've agreed to request it and
25 presumably have requested it. All right. That takes care of

N6FDBANO

1 that.

2 Now, you've already given the estimates as to trial
3 duration. Have you folks given any thought to filing dates for
4 in limine motions, proposed voir dire, and requests to charge?

5 MS. SASSOON: We have, your Honor.

6 THE COURT: Is there a proposal?

7 MS. SASSOON: Two days ago we outlined a proposal to
8 the defense that they are still considering, so we do not have
9 a joint proposal, but we are in discussions and expect to
10 continue to meet and confer. We're happy to provide the Court
11 with our proposed schedule, but it has not been --

12 THE COURT: I understand holey water has not yet been
13 sprinkled, but why don't you tell me what your proposal is,
14 because if I don't find it acceptable, it may change your
15 discussions.

16 MS. SASSOON: Yes, your Honor.

17 Our proposal is that six weeks before trial, the
18 government would produce 3500 material, *Giglio*, and other
19 related witness materials; and that six weeks before trial as
20 well, the parties would provide expert notice. Five weeks
21 before trial, the government would provide 404(b) notice. Four
22 weeks before trial, the parties would provide rebuttal expert
23 notice; and the government would provide a witness list, and an
24 exhibit list, and the parties would file their motions in
25 limine. Three weeks before trial --

N6FDBANO

1 THE COURT: You're going a little fast for me.

2 MS. SASSOON: I'll slow down.

3 THE COURT: Four weeks before, you give 404(b) notice.

4 MS. SASSOON: Five weeks before would be 404(b)
5 notice.

6 THE COURT: Five weeks.

7 MS. SASSOON: Four weeks before trial would be
8 rebuttal expert notice.

9 THE COURT: Just hold off now.

10 So six weeks before trial would be expert notice,
11 right?

12 MS. SASSOON: Yes, your Honor.

13 THE COURT: Five weeks before would be 404(b).

14 MS. SASSOON: 404(b).

15 THE COURT: Four weeks before --

16 MS. SASSOON: Rebuttal expert notice, from both
17 parties.

18 THE COURT: Uh-huh.

19 MS. SASSOON: Motion in limine deadline for both
20 parties.

21 THE COURT: Four weeks before?

22 MS. SASSOON: Yes. And government witness and exhibit
23 lists.

24 THE COURT: Also, four weeks?

25 MS. SASSOON: Yes. Although, as explained to the

N6FDBANO

1 defense, these proposals of government deadlines were
2 conditioned on the defense agreeing to a reasonable schedule
3 for their exhibits and disclosures, which I'll get to, because
4 that's also built into our proposal.

5 THE COURT: Okay.

6 MS. SASSOON: And as is also customary in our view, we
7 would anticipate that we would continue to update our exhibit
8 list and witness list in the weeks before trial, and that the
9 exhibit list four weeks before trial would not be final.

10 THE COURT: Proposed charge?

11 MS. SASSOON: So three weeks before trial would be
12 proposed charge, *Daubert* motions, voir dire, and the deadline
13 for defense exhibit list and witness list.

14 THE COURT: Uh-huh.

15 MS. SASSOON: Two weeks before trial, deadline for
16 opposition to motions in limine, and the deadline for defense
17 production of 26.2 material.

18 And, finally, we have proposed that one week before
19 trial, we'd have a final pretrial conference.

20 THE COURT: All right. Let me just make sure -- I
21 think your proposed schedule, with respect to *Daubert* motions,
22 which I fear are going to be extensive and complicated, it does
23 not give me nearly enough time. The same is true for the
24 proposed charge, and for the motions in limine. So I'm going
25 to ask you to go back to the drawing board on that.

N6FDBANO

1 MS. SASSOON: Yes. Thank you. It's very useful to
2 have your Honor's input.

3 THE COURT: I look here and I see four lawyers at the
4 back table, and, oh, a bunch at the front table, and Lord knows
5 how many more there are; and I have myself, and two law clerks,
6 and 300 other cases.

7 MS. SASSOON: Do you have anything more specific in
8 mind when you say you'd like these materials sooner?

9 THE COURT: Several more weeks earlier.

10 MS. SASSOON: Yes, your Honor.

11 THE COURT: Even that would be pressing it. Okay?

12 MS. SASSOON: Understood.

13 MR. COHEN: Your Honor, on the schedule we have, we
14 have a couple of other points, if we might.

15 THE COURT: Sure.

16 MR. COHEN: And we're happy to first discuss this with
17 the government, and then come back to your Honor. We're going
18 to talk internally, and with the government about their
19 proposed schedule for the defense exhibit list and the rebuttal
20 expert list from the defense or designation from the defense.
21 Given that we don't have an obligation to call an expert, we
22 think that may be a little too early, but we'll talk to the
23 government about it and come back to your Honor.

24 THE COURT: Well, you of course have no obligation to
25 call an expert, and I will probably break out a bottle of

N6FDBANO

1 champagne if you elect to exercise your right not to call one.

2 MR. COHEN: What kind of champagne, your Honor?

3 THE COURT: Well, maybe not the very best, but it
4 would be high up there.

5 MR. COHEN: The other thing is, we just raised it with
6 the government, and, in fairness, we should talk to them about
7 it first, and we may be asking the Court to use a jury
8 questionnaire. And if the Court agrees to that, we'll have to
9 build it into the schedule. We're not ready to --

10 THE COURT: I will tell you it will take a good deal
11 of convincing --

12 MR. COHEN: Okay.

13 THE COURT: -- to push me that far, because I've used
14 them, and I've not used them, and I've seen what happens when
15 colleagues use them. The administration of the process is
16 remarkably complicated and error prone. Think of the *Maxwell*
17 case as one error --

18 MR. COHEN: I am familiar with that case, your Honor.

19 THE COURT: I bet you are.

20 Think of how much work the jury department has to do,
21 how much stuff has to be copied under extreme time pressure,
22 how many questionnaires are you going to get, what are you
23 going to do with them. The only kind of jury questionnaires I
24 have been using, in my later years on the bench, on occasion,
25 and only on occasion, is directed only to the issue of

N6FDBANO

1 hardship.

2 MR. COHEN: Uh-huh.

3 THE COURT: Because you can very often screen that in
4 a lengthy trial right up front.

5 MR. COHEN: Hardship arises from the length of the
6 trial.

7 THE COURT: Length of the trial, but also travel,
8 commuting problems. We do get Rockland County jurors and
9 Putnam County jurors, as I remember.

10 MR. COHEN: Yes.

11 THE COURT: It can be very difficult for those folks.
12 There are issues with employer payments.

13 MR. COHEN: Yes.

14 THE COURT: Now, this --

15 MR. COHEN: Yes. Like your Honor, we've used them,
16 and we've also not used them, your Honor. We will take your
17 Honor's comments to heart. We think, given the complexity of
18 this case and the issues that have arisen, there may well be an
19 appropriate use for them here, but we'll think about it and
20 come back, your Honor.

21 THE COURT: Look, in my last trial, which everybody
22 knows something about, both sides wanted questionnaires. I
23 said no. I solicited voir dire questions. They submitted
24 about 25 questions, and I had a questionnaire, but I used it in
25 court. It had 70 or 80 or 90 questions, and nobody had

N6FDBANO

1 anything significant that they wanted me to ask about by the
2 time I got finished.

3 MR. COHEN: Okay.

4 THE COURT: So it will be a thorough voir dire, you
5 can be assured of that, but the added overlay of dealing with
6 the questionnaires is just a big cost.

7 MR. COHEN: We hear your Honor. We'll come back to
8 your Honor.

9 THE COURT: All right. Fine. We're all determined to
10 get to the same place, which is a fair jury.

11 MR. COHEN: Yes.

12 THE COURT: One that can sit without worrying that
13 they're going to be able to pay for the paper towels on Friday.

14 Okay. So much for that. Now let me get to the
15 discovery-related motions. I think our discussion of the
16 schedule may well have mooted everything but the question of
17 whether the FTX debtors are part of the prosecution team.

18 Am I right, that's all that's left?

19 MS. SASSOON: The defendant made a bill of particulars
20 motion, but we think that our proposed schedule moots what we
21 view as essentially a request for an early exhibit list.

22 THE COURT: I thought so, but is there any
23 disagreement about that?

24 MR. EVERDELL: I mean, your Honor, I don't want to
25 reiterate our papers on the bill of particulars, or take too

N6FDBANO

1 much time about that, but we're still at a loss to understand
2 what the lenders we're --

3 THE COURT: You know, the reason I ask you to use that
4 is because my hearing is no longer exactly what it was when I
5 was 23.

6 MR. EVERDELL: I understand, your Honor.

7 I'll be brief on this. I think the only point we'd
8 raise on the bill of particulars is we still don't have
9 information that we think is essential to understand, for
10 example, the lender accounts and the investors' accounts. For
11 example, yes, there is a speaking indictment, it does talk
12 about a narrative, and, yes, we have a lot of discovery. But
13 we don't know which lenders. There are dozens of lenders. We
14 have thousands of loan agreements. Which loan agreements are
15 we talking about?

16 It's impossible for us to search and know what loans
17 were the ones that were allegedly at issue in the lender fraud
18 counts simply by searching the discovery. We can't identify
19 which lenders and which loans we're talking about. Same thing
20 with the investors' counts, dozens of investors, thousands if
21 not almost a million pages of documents. How can we know what
22 offering is related to, or which perspective offering, which
23 potential investor, what is the misleading document.

24 I think these, in particular, your Honor, these are
25 things we don't know and don't really have a way of knowing

N6FDBANO

1 with the information we've been given, even with the voluminous
2 discovery, and so we would require a bill of particulars, or
3 ask for a bill of particulars on those issues, respectfully.

4 THE COURT: I'll hear from the other side.

5 MS. SASSOON: Your Honor, this is the type of request
6 that Courts in this district have routinely rejected as seeking
7 the evidentiary minutia of trial, particularly where, as here,
8 the government is prepared to provide early disclosure of an
9 exhibit list and of witness material. The defense' requests
10 have no legal support, including from the only cases that they
11 cite in their brief, and I don't want to belabor the points
12 that we made in our opposition, but I'd like to just draw the
13 Court's attention to *Akhavan*, which is cited in the defendant's
14 reply brief.

15 They cite that case as an example where a bill of
16 particulars was ordered in a case with voluminous discovery,
17 but, in fact, in that opinion by Judge Rakoff, the Court
18 rejected precisely these kind of bill of particular requests.
19 For example, the Court denied a request for details about the
20 victim banks in a wide ranging bank fraud conspiracy,
21 explaining that this sought, at best, evidentiary detail. And,
22 as Judge Rakoff noted, the goal of the alleged conspiracy in
23 that case was not to defraud any one bank in particular.
24 That's similar to this case here, where the indictment alleges
25 a general scheme with similar types of misrepresentations made

N6FDBANO

1 to lenders and investors.

2 The Court in *Akhavan* also denied a request for details
3 about specific actions, including misrepresentations made in
4 furtherance of the scheme, and Judge Rakoff held that this was
5 simply an attempt to pin the government to particular
6 evidentiary details; the indictment's description of the scheme
7 is sufficiently clear for the defendants to understand the
8 crime of which they are accused.

9 That's true here. Despite what counsel has said about
10 the difficulty of discerning the nature of the government's
11 allegations, the indictment is very detailed about the nature
12 of the scheme, the types of misrepresentations being made
13 across the board to investors and lenders about FTX's financial
14 condition, about the relationship between FTX and Alameda,
15 about the secret misappropriation of customer money, about
16 secret aspects of the computer code that favored Alameda; and,
17 in this case, that are only four investment rounds that are at
18 issue, with a similar set of documents that were generally
19 provided to investors.

20 The defense has referenced dozens of lenders, dozens
21 of investors, but, in fact, the government has produced a
22 narrower set of material from specific investors and lenders
23 that produced documents to the government organized by
24 producing party. And the government has also produced, among
25 other things, a 60-page disclosure letter that includes some

N6FDBANO

1 information provided to the government by investors.

2 The only bill of particulars granted in *Akhavan* was
3 for a list of the names of co-conspirators under circumstances
4 very different from those here, as we lay out in our opposition
5 brief. And I'll just say that there's a bit of a mismatch here
6 between a description of the complexity of the case and the
7 discovery, versus the discovery that pertains specifically to
8 the lenders and investors.

9 As the defense notes in its own reply brief, they
10 identify only about 44,000 pages produced by a dozen different
11 investors, and about 900,000 pages produced by a dozen lenders.
12 That's not an unmanageable amount of material for the
13 defendants to -- I see your Honor is laughing. In the scheme
14 of the white collar cases brought in this district where --

15 THE COURT: I know, it's nothing. We've got to go
16 back to carbon paper.

17 MS. SASSOON: In the context of other cases where
18 Courts have rejected similar bill of particular requests, that
19 does not take this case outside of the norm for cases that are
20 being charged in the white collar field these days.

21 So unless your Honor has questions about that, it's
22 our position that this should be rejected.

23 THE COURT: Thank you.

24 Any response to that, Mr. Everdell or --

25 MR. EVERDELL: We rest on our papers, your Honor.

N6FDBANO

1 THE COURT: Yes. There will be no bill of
2 particulars. That's denied.

3 So other than the FTX debtors being part of the
4 government team, that takes care of discovery, that and the
5 schedule discussions, yes?

6 Okay. Everybody's nodding affirmatively.

7 So let's get to that argument. Is that you,
8 Mr. Cohen?

9 MR. COHEN: Yes, your Honor.

10 THE COURT: Let's try and do it in the next 5, 10
11 minutes.

12 MR. COHEN: Yes. I'll be brief, your Honor.

13 So there's no dispute that the government is under an
14 order from this Court to produce *Brady* material that is known
15 to the government promptly in realtime. As your Honor pointed
16 out in *Blaszczak*, that's a variance from the prior practice of
17 how *Brady* was evaluated, which was retrospective.

18 There's no question the government --

19 THE COURT: I'm not sure I agree with that
20 characterization, but go ahead.

21 MR. COHEN: Okay. I may be shorthanding too much in
22 the interest of time, your Honor.

23 But moving on, the question is whether or not the
24 debtors have become part of the prosecution team, and I
25 couldn't really tell in the government's papers whether they're

N6FDBANO

1 taking the position that a third-party could never become a
2 part of the prosecution team, or they're position is less than
3 that. We think it's clear under the *Martha Stewart* case,
4 *Blaszczak* from your Honor, and other cases in this circuit that
5 there is no per se test, that what Courts do is they look at
6 various factors to make a determination whether, in the
7 specific case before it, there is a basis for the finding.

8 And we submit, and as we laid out in our papers, when
9 you look at those factors, they're all present here. The
10 government has, or the FTX debtors have controlled the
11 documents, they have reviewed documents in what they describe
12 as a circular effort with the government. They've acted --
13 gone back and forth in terms of gathering facts. We laid out
14 in our paper a very significant sequence with respect to the
15 charge of unlicensed money transmitter, in which the government
16 sent an email to the debtors and said, this is one of our top
17 priorities; we'd like you to gather everything on this; and
18 their response was, there are 6,000 documents we have to go
19 through them, and we'll make a presentation to you. That's how
20 you would talk to someone who is on your team.

21 It doesn't matter whether the government leads the
22 team or not. I think there's something to that effect in the
23 papers which I think misses the point. It's whether they were
24 a part of the team. And they then, at the end of this
25 sequence, the debtors waived privilege, and they said, we're

N6FDBANO

1 waiving it to assist in the investigation or its investigation.
2 So that's under the *Stewart, Blaszczyk* factors, another
3 example.

4 The government has interviewed -- excuse me, the
5 debtors have interviewed witnesses, but, more importantly, for
6 purposes of this analysis, they've done readouts of those
7 interviews to the government attorneys. Now, the government in
8 its papers says, well, they didn't give us any memorandum.
9 They just gave us readouts. But, you know, they're reading --

10 THE COURT: Who selected the people they interviewed
11 for whom readouts were given?

12 MR. COHEN: As I understand it, the government
13 selected who they give the readouts to.

14 THE COURT: My question is who decided to interview
15 those people.

16 MR. COHEN: I don't know that, your Honor, but at
17 least the submission of the government said who did that -- who
18 made the decision of who they would interview. In addition,
19 your Honor, they have -- the record reflects, and, again, we're
20 only getting bits and pieces of this from the bills filed in
21 the bankruptcy proceeding from certain materials that have been
22 produced to us in discovery. That's why we're making this
23 application. But it indicates that the government -- the
24 debtors have assisted the government in drawing conclusions
25 about how facts and materials relate to each other, such as the

N6FDBANO

1 allegation relating to the \$45 million hole in the FTX U.S.
2 account.

3 So when you put all this together, we submit, your
4 Honor, it shows that for these facts, in this case, and we're
5 not advocating this as a uniform rule applicable in all cases,
6 given how involved this debtor was, spending 90 percent of its
7 time in the -- from the beginning of the case working with the
8 government, countless hours of its own and attorneys' time,
9 there's a basis to make the finding. And the other thing we
10 wanted to stress to your Honor is --

11 THE COURT: It's in the debtors' interest, is it not,
12 to further the prosecution for its own purposes?

13 MR. COHEN: Well, the debtor has its own purposes, and
14 that's, in fact, your Honor, part of our argument. They're a
15 third-party here that doesn't have a *Brady* obligation. And to
16 the extent they've become involved with and enmeshed within
17 part of the team, that's being kept from the defense. And I
18 think the best -- not the best, but one of the examples that is
19 most relevant, because there were letters about it today, and
20 your Honor just touched on it, was the codebase history.

21 THE COURT: The what?

22 MR. COHEN: The codebase history. I'm sorry, your
23 Honor. The codebase history.

24 Let me give the significance, your Honor, and the
25 sequence, and I think this ties right into the motion. The

N6FDBANO

1 significance is, as I understand it, and I'm learning like your
2 Honor a lot about technology in this case, but the codebase
3 history reflects who worked on the code, what drafts there were
4 of the code, what edits were made to the code, who made them,
5 what comments were made when the edits were made, who had
6 access to and read those comments, and who didn't.

7 And given the allegations about Mr. Bankman-Fried
8 causing or directing an adjustment to the code in a nefarious
9 way, it's obviously highly relevant that this evidence may well
10 show or may tend to show that there are alternative
11 explanations for these edits and adjustments, that others,
12 including the cooperating witnesses, were aware of, and that
13 Mr. Bankman-Fried did not access. This is all incredibly
14 relevant.

15 So here is the sequence, your Honor. We asked the
16 government for it in our Rule 16 *Brady* letter. They said to
17 us, no, you can't have it, because they're not -- FTX is not
18 part of the prosecution team. We went to FTX, the debtor, and
19 asked them informally for it. They said, no, you can't have
20 it. We're here before your Honor, and I'm sure the next step
21 would be -- well, the next step would be if we filed a motion
22 like we did, like I'm sure your Honor's going to deal with on
23 the other issue, there would be an opposition to the motion on
24 Rule 16, Rule 17. And all we've gotten is a statement in
25 today's letter, well, we'll ask them about it.

N6FDBANO

1 That's far different than an order from your Honor
2 saying, here's a schedule, you have to -- you have to ask them
3 about it, you have to ask them to provide it, you have to
4 provide it by X date, because otherwise, your Honor, we're
5 faced with a situation where they are, quote, asked about it;
6 they consider it for a month; they get back; they say they
7 can't do it, so on and so forth, and the clock has run out on
8 it us. And this is potentially very important information that
9 would tend to exculpate our client.

10 So in the interest of time --

11 THE COURT: Or inculcate him.

12 MR. COHEN: Also possible. Also possible.

13 And we took that into account in making this request,
14 your Honor, although I have a feeling if the government thought
15 it would inculcate my client, they would have the codebase
16 already. But so in the interest of time, you know, I think
17 that's the gist of the argument, your Honor.

18 THE COURT: Okay. I'll hear from the government.

19 MS. SASSOON: Just a few points, your Honor.

20 I'll start where Mr. Cohen ended. The case law is
21 clear that the power to act on behalf of the government to
22 collect documents is not equivalent to a duty to act, and here
23 the government does not have a duty to review the entirety of
24 the materials in the possession of the FTX debtors, because
25 they're not part of the prosecution team.

N6FDBANO

1 I want to respond to a few things that Mr. --

2 THE COURT: Let me just get clear about one thing.

3 The FTX debtors are a group of a number of different entities,
4 right?

5 MS. SASSOON: Yes, and they're all represented by
6 Sullivan & Cromwell.

7 THE COURT: Where are they located?

8 MS. SASSOON: The debtors?

9 THE COURT: The debtors. Are they in the United
10 States?

11 MS. SASSOON: Some of the entities are in the United
12 States.

13 THE COURT: Where are the others? How many -- what's
14 the breakdown, U.S. versus foreign?

15 MS. SASSOON: I don't have it at my fingertips. It's
16 dozens of entities, your Honor, including foreign.

17 THE COURT: Mostly U.S. or mostly foreign?

18 MS. SASSOON: Mostly foreign.

19 THE COURT: Go ahead.

20 MS. SASSOON: So a few additional things. 5(f) in the
21 government's view does not change our constitutional
22 obligations with respect to *Brady* or our obligations under Rule
23 16. This case does not require the Court to consider whether a
24 third-party can ever be part of the prosecution team, because
25 this is not a case that's far afield of the heartland of cases

N6FDBANO

1 in this district that have found that cooperating third parties
2 are not part of the prosecution team, and their materials are
3 not in the possession of the government.

4 Mr. Cohen said that all the factors that Courts
5 consider in deciding whether a third-party is part of the team
6 or present here, that just can't be squared with the facts
7 here. Whereas the government has laid out, the debtors did not
8 participate in any of the investigative duties of the
9 government, did not participate in any strategic decision
10 making, had no role in pursuing charges against the people
11 being prosecuted here, had no role in the defendant's arrest,
12 did not attend a single witness interview.

13 In *Blaszczak*, which Mr. Cohen referenced, your Honor
14 found that the SEC was not part of the prosecution team even
15 though the SEC had participated in interviews with the
16 government and more materials had been shared between the
17 parties. Here, the government has not shared any 6(e) material
18 with the debtors, they have not reviewed documents the
19 government has collected in its case, other than for purposes
20 of assessing privilege, and this case is just not different
21 from the many cases we've cited where a third-party cooperator
22 was not considered part of the prosecution.

23 As your Honor -- in response to your Honor's question
24 about who selected the interviewees for the FTX debtor
25 interviews, that was FTX. After learning about who the debtors

N6FDBANO

1 interviewed, the government requested readouts related to some
2 of those interviews, which were conducted for the debtors' own
3 purposes. And as your Honor noted, it is true that the debtor
4 has its own interests here in being cooperative and
5 investigating the fraud, and that is precisely why it would be
6 untenable to deem them part of the prosecution team.

7 In their reply brief, the defendants made light of the
8 scope of their request, which is not limited to the codebase.
9 It's a request that the government review all of the FTX files
10 for discoverable information, which necessarily would involve
11 millions of pages of document, and terabytes of data. And they
12 claim that this burden on the government, quote, warrants no
13 consideration. But, thankfully, the Second Circuit and Courts
14 in this district have been less sanguine about this, and
15 they've recognized, including the Second Circuit in *Avelino*,
16 that imposing that type of duty on prosecutors would result in
17 a state of paralysis in prosecutions, and would be untenable.
18 And we think that that's true here.

19 Unless your Honor has questions about the
20 circumstances of the debtors' cooperation that I can address,
21 or any other questions, we'll rest on our submission.

22 THE COURT: Thank you.

23 Anything else, Mr. Cohen?

24 MR. COHEN: Just briefly, your Honor.

25 One point I meant to mention in my initial comments on

N6FDBANO

1 this is how extraordinary this is, your Honor. This is far
2 beyond what we typically see in a cooperation situation.

3 We have an entity that is not a target of an
4 investigation; as far as we know, has no other reason to do it;
5 that has been from literally day one involved with the
6 government in making presentations, controlling the documents.
7 Usually the government takes control of the documents. It's
8 really extraordinary. Waiving privilege when there is no
9 requirement that it do so. Turning over the contents of
10 interview memos when there is no requirement to do so.

11 And on these facts, given the level -- the level at
12 which the debtor, by its own admission and public statements
13 that we cited to your Honor, has been enmeshed with the
14 government, what I keep asking myself is if the debtor hadn't
15 done these things, someone on the government team would have
16 done them, would have reviewed the unlicensed money transmitter
17 documents, work through the issues about whether there's a
18 potential charge there or not, work through the issue of the
19 \$45 million hole.

20 Now, the government can say, we did that anyway.
21 Okay. I understand that. But somebody would have done that,
22 and somebody did do that, and that was the debtor. So if we
23 look at, as the *Martha Stewart* case says, we look at what
24 people do rather than their status, on these facts, certainly
25 from the sequence from December to now, there's a basis for the

N6FDBANO

1 finding. There's certainly a basis for the Court to order that
2 specific *Brady* request from the defense be considered, that the
3 government have the debtors respond to and consider specific
4 *Brady* requests from the defendant, like the one I mentioned
5 about the codebase history, and some of the others that are in
6 our papers.

7 THE COURT: I understood that they have made that
8 request.

9 MR. COHEN: Well, again, it's a far different thing to
10 make the request without the force of an order from your Honor
11 behind it, and a schedule.

12 THE COURT: I request the Bureau of Prisons to do
13 things all the time. There's an old Yiddish expression, *gar*
14 *nicht helfen*, which means "it doesn't help at all."

15 MR. COHEN: Well, I can think of the comeback, but I'm
16 not going to say it here.

17 THE COURT: Okay. My father's long lost knowledge of
18 some Yiddish.

19 MR. COHEN: Right. So, and then I won't invoke the
20 *rachmones* doctrine here, your Honor.

21 THE COURT: Right.

22 MR. COHEN: But, yes, I think your Honor has the
23 argument.

24 THE COURT: You're going to very much enjoy the court
25 reporter's transliteration of our discussion.

N6FDBANO

MR. COHEN: We'll get ChatGPT to do that, your Honor.

THE COURT: Yes. Fine. I will probably -- probably, I don't promise, write something brief about this, but substantially for the reasons that the government has advanced, insofar as the motion is to require the government to review the files of the FTX debtors, it's denied. The bill of particulars is denied.

The part of the motion that seeks immediate production of *Brady* and *Giglio* material is denied without prejudice to renewal in the event that's necessary after the parties work out a schedule that is mutually acceptable to them and to me. The same is true for the part of the motion seeking immediate production of the Jencks Act material, and the witness list, with the same qualification. The same is also true of the 404(b) evidence disclosure part of the motion.

I think, then, that takes care of it for this morning, yes?

MR. COHEN: (Nodding)

THE COURT: I really do appreciate counsels' succinctness and responsiveness. You wrote great papers. You made good, targeted arguments. Now it's my turn.

Thank you.

(Adjourned)